

UNIVERSITY OF ZAMBIA
School of Law

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***THE ZAMBIAN PRIVATISATION EXPERIENCE:
LEGAL PERSPECTIVES***

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Date: 25/11/94

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***THE ZAMBIAN PRIVATISATION EXPERIENCE:
LEGAL PERSPECTIVES***

by

MWILA MWABA

Being a paper submitted in partial fulfilment of the examination requirements for the Degree of Bachelor of Laws of the University of Zambia.

November, 1994

**To Mum and Dad,
for all their
sacrifices.**

ACKNOWLEDGEMENTS

Firstly, I thank GOD for always giving me the strength to finish what I have set out to accomplish in my life.

Special thanks go to Mrs. J. Chaila (Assistant Legal-Counsel, ZCCM, Nchanga House, Kitwe; formerly Head Legal-Counsel, Zambia Privatisation Agency) without whose assistance this research would not have been possible. I am also indebted to my supervisor Dr. Mabula for having tirelessly examined this work and for her advice. My gratitude also goes to Mr. Mwandenga (Head Legal-Counsel, Z.P.A.), Mr. Matanda (Publicity and Marketing Manager, Z.P.A.) and Mrs. F. Mumba (Senior Technical Adviser, Z.P.A.) for their assistance and especially their patience. My thanks also extend to Miss Elsie Mabula, Ministry of Legal Affairs.

In life, one always has special people who are a source of inspiration and encouragement. My thanks therefore go to my family and to my very good friends Irene Chongo and Mavis Kasongo, who have especially helped me in my academic life. To Chola, Bwalya, Muntanga and Janet for their cheerfulness. To all my friends, especially from Church (particularly from the C.L.C. group). And finally, my very special thanks go to Musonda for taking charge of the printing of this work. But most of all for teaching me to believe in myself and for being to me all that words can never fully express.

ABSTRACT

The aim of this paper is to provide an over-view of Zambia's privatisation experiences. The nature of the subject of privatisation is broad. Therefore, it is not intended to delve into great depth on the general issues of privatisation but to narrow the analysis to the major legal perspectives, namely the Privatisation Act and supporting legislation. However, in order to introduce the paper to the reader, there is a discussion in the initial chapter on the wider privatisation perspectives and experiences.

The paper is meant to provide an insight into the privatisation process in Zambia *vis-a-viz* legislation relating to the same. The paper will examine the Privatisation Act by highlighting the main features of the Act together with their strengths and weaknesses. It will also look at some of the major legal constraints that the Zambia Privatisation Agency is facing. The paper will also present a brief background of the divestiture programme. A thorough, albeit not exhaustive, discussion of the need to review certain legislation in view of the programme will be attempted. Finally, a conclusion of the paper will be made, and recommendations will be put forward where necessary.

It should be borne in mind that the paper is not meant to be a mere *critique*, but rather an insight or indeed a visitation into a subject that is fast gaining the interest of a wide spectrum of the Zambian society, ranging from the peasant to the entrepreneur.

OBJECTIVES:

1. To analyse the concept of privatisation and to present a background of the economic development of Zambia from independence to date.
2. To look at the main features of the privatisation programme by:
 - (a) presenting a brief over-view of the Divestiture Programme;
 - (b) analyzing the main features of the Privatisation Act and assessing their strengths and weaknesses;
 - (c) highlighting the major legal constraints that the ZPA is facing in implementing the programme;
 - (d) emphasising the need to review supporting legislation to privatisation so that it can promote the programme.
3. Finally, to make recommendations in areas where it is felt that certain factors should be considered.

RESEARCH PROBLEM

This paper is based on the criticisms that have been levelled against the privatisation programme in Zambia and also on the wider privatisation experiences on the international scene. The paper is confined to the major legal aspects of privatisation.

METHODOLOGY

This research is based on data obtained by way of library research, interviews, official publications, statutory provisions and other relevant literature.

OUTLINE OF CHAPTERS

Chapter 1 is an introductory chapter which deals with the concept of privatisation and also traces Zambia's economic policies from independence to the date. It also presents a brief over-view of the Divestiture Programme in Zambia.

Chapter 2 analyses the main features of the Privatisation Act and highlights the strengths and weaknesses of the Act.

Chapter 3 presents a discussion on the need for reviewing supporting legislation in order to promote the programme, and it also outlines the main pieces of legislation that require reviewing. This chapter also takes a brief look at the Stock Exchange, which is a supporting institution for a privatisation programme.

Chapter 4 presents a brief summary of the paper together with recommendations.

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Chapter 1

1.0 THE CONCEPT OF PRIVATISATION

Privatisation may be defined as the transfer or return to the private sector or management of activities previously undertaken by the state or by municipal or other public authorities.¹ The Privatisation Act defines privatisation as:

"the transferring to the private sector of part or the whole of the equity or other interest held by the government, directly or indirectly in a state enterprise wholly or partially owned by the government."

The process of privatisation is achieved by the divestiture of an existing state-owned enterprise which is in a form and in a condition in which it can be sold. In some other cases, what is divested is the asset rather than the enterprise. Such assets may be made available by transfer from the state enterprise or as a result of its formal liquidation. Although the term *divestiture* is often used synonymously with privatisation, the two are different.

1 H. Sasson, *Privatisation: The Conceptual Framework And Justification*; Seminar On Privatisation For MPs, Mulungushi Conference Centre, 10th February, 1992

The Privatisation Act defines divestiture as:²

"the disposing of the whole or part of the assets and share of a state-owned enterprise."

For the sake of clarity, it is necessary to define the term state-owned enterprise. The Act lays down the following definition:³

"A state-owned enterprise means a corporation, board, company, parastatal or body in which the government has direct or indirect ownership, equity or interest, and includes partnerships, joint ventures or any form of business arrangement or organisation in which the government has direct or indirect interest but does not include a government department."

2 **Section 2**

3 **Ibid.**

1.1 OBJECTIVES OF PRIVATISATION

In developing countries, the main objectives of privatisation are as follows:⁴

- to relieve budgetary strains on the government;
- to improve the efficiency of enterprise performance;
- to improve the allocational efficiency of investments.

1.1.1 ADVANTAGES OF PRIVATISATION

The main reason why many governments undertake privatisation programmes is due to the fact that the public sector, especially in developing countries, is too large and privatisation benefits both the individual consumers of goods and services and the economy as a whole.⁵ Privatisation tends to succeed because competition forces the economy to respond to the needs of the consumer. It promotes efficiency, keeps down costs and motivates companies to be innovative. Privatisation also results in higher wages and salaries.⁶

4 V.V. Ramanadham, (ed.), *Privatisation In Developing Countries*, (London and New York: Routledge, 1989), p.419

5 Ministry of Commerce, Trade and Industry, *Privatisation Program In Zambia - Long Term Divestiture Strategy*, (1991), p.2

6 V.V. Ramanadham, (ed.), p.419

1.1.2. DISADVANTAGES OF PRIVATISATION

Privatisation, on the other hand, also has negative effects, namely:

- (a) It often leads to retrenchments as firms are prepared for privatisation;
- (b) There may be need to deal with liabilities such as settlement of unpaid taxes by the government, as the seller, on behalf of the enterprise being sold;
- (c) Technical skills needed to deal with large enterprises, such as electricity boards, to prepare them for privatisation may also be lacking, especially in developing countries;
- (d) Privatisation in some cases can lead to private monopolies.

1.1.3. THE INTERNATIONAL EXPERIENCE

There have been various successful privatisation programmes world-wide. These seem to be as a result of the establishment and wide publication of procedures and policies on valuation, pre-qualification of bidders, and disposal of assets. This is important in order to lend credibility to the privatisation programme and ensure its acceptance by the public at large.⁷

Frequent updates and progress reports presented to the public stating, *inter alia*, how each company is sold, the names of the buyers, and other relevant facts, are important. For example, *Malaysia's* privatisation programme has been successful because it was based on the establishment of clear guidelines on how the programme was to be implemented. In the same manner, *Argentina, Bangladesh, Brazil, Chile and Tunisia* have carried out relatively successful privatisation programmes.

1.2 HISTORICAL BACKGROUND TO PRIVATISATION IN ZAMBIA

In order to provide an intelligible picture of the privatisation programme in Zambia, it will be necessary to give a brief historical background of the economy, from independence to date.

1.2.1 NATIONALISATION OF THE ZAMBIAN ECONOMY

Upon attainment of independence, the Zambian Government found itself in a dilemma. All the major means of production and services were owned and controlled by foreigners. In an effort to enhance national development, the government decided to embark on a nationalisation process.

International law defines nationalisation as:

*"the process by which property, rights and interests in property are transferred from private to public ownership by agents of the state acting on the authority of a legislative or executive measure. After transfer, the property remains in the ownership of and is exploited by the state or a body created by the state."*⁸

Zambia had no statutory definition of the term and hence relied on this general definition of nationalisation. International law has also specified certain conditions that have to be fulfilled in order to make a nationalisation process valid.

In the leading case of United States Mixed Claims Commission Case⁹ (or the Upton Case), the tribunal held that:

"The right of the state under the stress of necessity to appropriate private property for public purpose is unquestionable but always with corresponding obligation to make just compensation to the owner thereof."

8 G.H. White, *Nationalisation of Foreign Property*, (London: Stevens and Sons, 1961) p.41

9 U.S.A., *United States - Venezuela - Mixed Claims Commission* (1903), p.174

Zambia, being part of the international community sought to abide by this principle in that the state decided that compensation was to be adequate and payable promptly upon nationalisation. However, *Section 18* of the *Constitution* was amended, and the power to determine compensation was moved from the Courts to the National Assembly, which was the final authority. Further, the requirement for the government to show that acquisition had been effected in the national (public) interest was removed.¹⁰

1.2.2 THE ECONOMIC REFORMS AND CREATION OF PARASTATALS

In order for the government to control the economy effectively, parastatals were set up. These were formed under the *Companies Act, Chapter 686* of the *Laws of Zambia*. Parastatals are public enterprises which are meant to be regulated in the same manner as privately owned companies.

Basically, the formation of parastatals was in two phases. In the first phase, the parastatal companies were created as a result of government's efforts to diversify the colonial legacy of a mono-economy based on mining. This was to be achieved through establishment of state enterprises in the non-mining sectors.

The second phase was after 1968, and it was based on the government's policy to acquire 51 percent shares in the major private enterprises operating in Zambia, including the mining companies.

Parastatals actually had their beginnings in the colonial period in 1960, with the formation of *INDECO* (the Northern Rhodesia Industrial Development Corporation Limited). *INDECO* was created under the *Companies Ordinance* as a public company and it was to operate in a commercial manner, free from bureaucratic control.¹¹ However, parastatals only became viable after independence when the government adopted a policy of entrenching itself permanently in business. Most parastatal companies were formed by government acquiring majority shares in already existing privately-owned companies. *INDECO* formed most of these companies as its subsidiaries and it held all the shares so acquired on behalf of the government. Between 1968 and 1970, the second phase in the development of the parastatals commenced with the pronouncement of economic reforms. The aim of these reforms was to extend the government's active participation to all sectors of the economy and to enable the government to assume direct control of the economy. The state was to acquire 51 percent shares in all the major private companies operating in Zambia.¹²

11 J.M. Mulwila, *Parastatal Companies And The Law In Zambia*, (Ph.D. Thesis, 1980), p.44

12 *Ibid.*, p.61

1.2.3 THE MULUNGUSHI ECONOMIC REFORMS

The *Mulungushi Economic Reforms*¹³ were presented on 19th April, 1968, and their aims were to promote entrepreneurship and to extend state participation in the economy. The first objective was to be achieved by phasing out non-Zambian traders from certain areas to create a vacuum for Zambians. For example, certain government contracts were to be limited to Zambians only and restrictions were placed on local bank credit facilities for non-Zambians.

However, the most important aspect of the Mulungushi Reforms was the extension of state participation in the economy. Twenty-six privately owned companies were asked to offer 51 percent of their equity, that is the share-holding of their companies, to the state. Most of these were accused of lack of interest in the welfare of Zambians, creating false monopolies and maintaining trade relations with the then *Rhodesia*, which was against government policy. INDECO handled the negotiations for the government take-over. Although twenty-six companies were listed for immediate take-over, eventually all major industries were to be nationalised. The mining companies, although excluded from this list, expressed willingness to offer their equity to government, but the latter declined the offer.

13 *Towards Economic Independence, Address to UNIP National Council, 19th April, 1968*

1.2.4 THE MATERO ECONOMIC REFORMS

Under the *Matero Reforms*,¹⁴ which were announced on 11th August 1969, the government stated its intention to take over 51 percent shares in existing and future operating mining companies through INDECO. No other companies were asked to offer their equity to the state but large industries were advised to form partnerships with INDECO.

The main purpose of these reforms was to enable the state gain control of the country's dominant means of wealth, and thereby spread development.

1.2.5 THE ECONOMIC REFORMS OF 1970

In the *1970 Economic Reforms*¹⁵ the state set out to participate in the financial sector, comprising mainly banks, insurance companies and building societies. All private insurance companies and building societies were to cease operating by certain dates.

14 *Towards Complete Independence*, Address to UNIP National Council, 11th August, 1969

15 *This Completes Economic Reforms: "Now Zambia is Ours"*; Address to UNIP National Council, 10th November, 1970

The reforms also proposed that all banks, with the exception of the *Zambia National Commercial Bank* (in which the government already had majority shares), should merge with either *Barclays Bank* or *Standard Bank* and the government was to take over 51 percent shares in form of additional capital.

In a deliberate ploy to encourage re-investment in the country, *Exchange Control Regulations* were introduced. These regulations were primarily targeted at those who were receiving compensation under the nationalisation process. It was now no longer possible to remit monies so gained without exchange control permission. During this period, INDECO became a wholly owned subsidiary of *ZIMCO (Zambia Industrial and Mining Corporation Limited)* which was formed to replace INDECO as the government's holding company.¹⁶

1.3 THE PROBLEMS OF PARASTATALS

With the establishment of parastatals, the Zambian government began to slowly face problems. It soon recognised the fact that it had neither the administrative capacity nor the economic resources to ensure that parastatals operated efficiently and effectively.

16 J.M. Mulwila, *Parastatal Companies And The Law In Zambia*, (Ph.D. Thesis, 1980), p.44

Most parastatals were operating at less than 50 percent capacity and they needed significant capital re-investment to rehabilitate and expand their business operations so that an adequate level of profitability was maintained. Further, parastatals lacked incentives for good performance, were often bound by bureaucratic procedures and controls, and were subjected to patronage and government interference.

These problems have not been unique to Zambia.¹⁷ In Kenya for instance, the *Institute of Economic Affairs* (I.E.A.) has cited the following reasons for the downfall of Kenyan parastatals, namely:¹⁸

- mismanagement and political interference in Kenya's state-owned enterprises, which has in turn led to chronic budget deficits;
- frequent appointments of people into key positions who lacked experience, personal integrity, and the technical and business skills required to manage these public firms.

17 Ministry of Commerce, Trade and Industry; *Privatisation In Zambia - Strategy And Design*, (1991), p.52

18 *Zambia Daily Mail*, Vol. One No. 11,063, April 7, 1992, p.2

Many parastatals have been unable to repay debts and the government has had to bail them out. *Kenya Airways*, like its counterpart *Zambia Airways*, is heavily in debt. The former has an estimated debt of 15.35 million Shillings.¹⁹

1.4 THE PRIVATISATION PROGRAMME IN THE SECOND REPUBLIC

In May 1990, the then President of Zambia made an announcement to the effect that Zambia would embark on a *Privatisation Programme*. A Task Force on the Restructuring of the Parastatal Sector was set up and in December 1990 it made recommendations on the objectives and policy on privatisation in Zambia.²⁰

The Privatisation Programme officially commenced in *March 1991* with the inauguration of the *Steering Committee On Privatisation*. This Committee was given the task of designing, implementing and monitoring the privatisation programme. It was given the mandate to privatise the ZIMCO companies except for the *Zambia Consolidated Copper Mines (ZCCM) Limited* and its subsidiaries.

19 Ibid

20 Ministry of Commerce, Trade and Industry; *Privatisation In Zambia - Strategy And Design*, (1991), p.52

A *Technical Committee On Privatisation* was also set up to be the working unit through which privatisation could be achieved. In December 1990, the Privatisation Task Force identified twenty-one companies to form the first *tranche* or group of companies for sale. These were relatively small companies and it was anticipated that the project would be completed within a year. A deadline was set for the offer for sale of at least six companies. This was in accordance with the deadline set within the *Structural Adjustment Programme (SAP)* as outlined by the *World Bank*. Under this agreement, the companies had to be offered for sale by the end of June.²¹ Political events, however, disrupted this programme as general elections were held in October 1991. It was considered prudent to await specific government directives before proceeding with the programme.

1.4.1 THE PRIVATISATION PROGRAMME IN THE THIRD REPUBLIC

The new government in December 1991 vested the responsibility of the Privatisation Programme in the *Ministry of Commerce, Trade and Industry*. Under the previous government, the programme fell under the ambit of ZIMCO.²²

21 *Privatisation Task Force Report, December 1990*

22 **Address By The President, Mr. F.T.J. Chiluba, At A Meeting With Representatives Of Donor Countries At State House, on 5th December, 1991.**

The Ministry recommended that clear policy guidelines should be set out and debated in *Parliament* so that there could be a legal mandate for privatisation in Zambia. Hence, the government suspended the sale of parastatals. The objectives of the privatisation programme were presented to Parliament as follows:²³

- to scale down the government's direct initiative in economic activities and correspondingly its administrative load;
- to reduce government budgetary costs arising from subsidies and capital expenditures;
- to promote competition and improve the efficiency of enterprise operations;
- to encourage wide ownership of shares;
- to encourage the growth of capital markets;
- to minimise the involvement of government bureaucracy in enterprise operations;
- to promote capital investment;
- to derive capital incomes for the Treasury.

The government further advanced the following reasons for wanting to undertake a privatisation programme: ²⁴

23 *Parliamentary Debates, 16th June - 9th July, 1992, p.105*

24 *Ibid., p.106*

- the parastatal sector was not operating to capacity;
- since nationalisation, the quality of goods and services had steadily deteriorated;
- most parastatal companies were operating at less than 50 percent capacity;
- the government had neither the financial nor the administrative ability to improve this situation;
- according to World Bank reports, the parastatal sector had cost the government *US\$ 455 million* in hidden subsidies (for instance where government bails out Zambia Airways to enable it pay landing fees to *I.A.T.A.*), between 1985 and 1989 as compared to dividends of only *US\$ 22 million* paid to the government;²⁵
- parastatals suffer from price regulations, and subsidies mask inefficiencies;
- parastatals are clearly overstaffed and poorly managed;
- privatisation results in the efficient mobilisation of resources;
- privatisation promotes competition, leading to higher levels of investment and greater efficiency in the economy;
- privatisation limits political interference in decision-making, which enables private share-holders to impose the financial discipline of private capital markets;

- the state is a poor entrepreneur in that it does not investigate whether its investments in public enterprises could be making higher returns elsewhere.

In March 1992, Cabinet approved the Privatisation Programme and adopted the objectives.²⁶ Meanwhile, the Technical Committee on Privatisation had drafted the *Privatisation Bill* which was presented to Parliament. After considerable debate, the *Privatisation Act* was given Presidential assent on 4th July, 1992.²⁷

The Zambian government thus put into place guidelines governing the implementation of the privatisation programme in the form of an overall Privatisation Act. The Privatisation Act outlines the procedures and policies governing the privatisation programme in Zambia. In the following Chapter an analysis of this Act will be made. The Act also created an *Agency* to implement the programme in Zambia. This Agency was to be independent of government control in order to enable it to work much more efficiently and also to maintain a measure of transparency.

26 Ibid.

27 Ibid.

1.4.2 THE DIVESTITURE PROGRAMME

The Z.P.A. has been given the mandate to coordinate the privatisation of all state-owned enterprises in Zambia.²⁸ It is the overall monitoring body of the privatisation programme and its duty is to carry out the government's intention to divest fully of its shareholding in S.O.E.s over a period of five years.²⁹ To this effect, a Divestiture Sequence Plan has been prepared so that enterprises will be divested in *Tranches* or groups.³⁰ The Act defines the Divestiture Sequence Plan as:³¹

a list of state-owned enterprises, as approved by Cabinet, categorised according to the sequence in which the whole or part of their shares will be disposed of over the period of the privatisation programme."

The divestiture sequence plan is only intended to provide a framework within which the divestment of S.O.E.s will be managed.

28 *Section 8 of the Privatisation Act*

29 **Ministry of Commerce, Trade and Industry, Technical Committee On Privatisation In Zambia: Privatisation In Zambia - Strategy And Design (Unpublished), (1991), p.5**

30 **Ibid**

31 *Section 2*

The listing is meant to be a flexible plan which will be adjusted over time, in line with the demand for the S.O.E.s.³² A *Long-term Divestiture Strategy* was prepared to articulate the principles upon which all subsequent elements of the privatisation programme in Zambia have been developed, for example the tranching concept. This refers to the groups in which companies have been placed in the Divestiture Sequence Plan. A Tranche is also referred to as a *Short-term Divestiture Programme*.³³

1.5 PRELIMINARY CONCLUSIONS

The liberalisation of the economy entails the creation of *market forces*, that is to say individuals now have the freedom to conduct their businesses with minimum restrictions.³⁴

The Zambian government embarked on a policy of liberalising the economy and it set out to remove impediments such as *Exchange Control Regulations* and *Price Controls*.³⁵

32 Interview With Mrs. F. Mumba, Senior Technical Advisor, Z.P.A., 2nd August, 1994.

33 Ibid

34 *New Economic Recovery Programme, 1992-94*, paras. 39-40

35 Ibid

The major aim of liberalising the economy is to facilitate a privatisation programme so as to encourage greater private sector involvement in the economy. This should result in the creation of a vibrant economy in which the private sector is allowed to flourish with the minimum of restrictions.

Zambia is already encountering some of the problems common to developing countries undergoing privatisation, such as lack of adequate financing of the programme and legal deficiencies. However, inspite of such problems, countries such as Malaysia have shown that a privatisation programme can succeed.

Chapter 2

2.0 THE PRIVATISATION ACT, No. 21 OF 1992

As discussed in *Chapter 1*, the *MMD* government suspended the privatisation programme until the relevant legislation was enacted.¹ This was to provide clear guidelines for the implementation of the privatisation programme as well as to embody the objectives of the government. The *Privatisation Act* (hereinafter referred to as "*the Act*") was enacted on 3rd July, 1992. It provided the government with legal authority to privatise public enterprises by selling its ownership interest to the private sector. The preamble to the Act states:

"An Act to provide for privatisation and commercialisation of the state-owned enterprises, to provide for the establishment of the Zambia Privatisation Agency and to define the functions of the Agency, to provide for the sale of shares in state-owned enterprises, and to provide for matters connected with or incidental to the foregoing."

The preamble to the Act refers not only to the privatisation of state-owned enterprises but also to the commercialisation of such enterprises.

¹ *Parliamentary Debates, 16th June - 9th July, 1992, p.102*

Unlike privatisation, which involves the transfer of part or the whole of the equity or other interests held by the government,² commercialisation is defined as:

*"the re-organisation of specified government departments into commercialised enterprises, which shall operate as profit making commercial ventures without the subversion of the government."*³

Such government departments would be transformed into business undertakings that would operate as commercial ventures. The *Minister of Commerce, Trade and Industry*, when presenting the *Bill* to Parliament in June 1992, cited *Government Printers* as a likely candidate for commercialisation..⁴

In drafting the Act, experiences of countries which have carried out successful privatisation programmes were studied. For example, the idea of the government retaining a *Golden Share*⁵ in a privatised State-Owned Enterprise (S.O.E.) is based on the *United Kingdom's* concept of a special or "golden" share. This is a basic feature of an overall Privatisation Act, and it will be discussed at length in this chapter.

2 *Privatisation Act, Section 2*

3 *Ibid*

4 *Parliamentary Debates, 16th June - 9th July, 1992, p.102*

5 *V.V. Ramanadham, p.33*

Britain, which is still undergoing a privatisation programme, has made a provision in its programme that allows government to retain a special share in certain privatised companies, such as *British Petroleum (B.P.)*, which are considered to be strategic industries. A special share enables government to intervene in a company's operations in the public interest or for strategic or defence reasons, where its intervention is triggered by specific actions undertaken by the company.⁶

It is very important for a country that intends to embark on a privatisation programme to look at the global experiences on privatisation in order to have a practical idea of how the theory operates in reality. For instance, Malaysia and Tunisia have carried out fairly successful privatisation programmes.

Among the observations they made and that are relevant to this chapter are that an overall Privatisation Act should at least attempt to address the following issues amongst others:⁷

- (i) The valuation of enterprises;
- (ii) The offer of enterprises to private investors, which lends transparency to the programme;

6 Ibid

7 Ibid., p.32

- (iii) The manner in which enterprises are to be sold;
- (iv) The utilisation of divestiture incomes;
- (v) The extent of any government shareholding;
- (vi) Any special forms of accountability to the consumer or public over a transitory period or all along;
- (vii) Legislation providing for the shareholding that a single shareholder is permitted to hold;
- (viii) Any version of Britain's special or golden share.

The Zambia Privatisation Act contains the following main provisions:- the special or golden share, transparency, ownership, prevention of the creation of monopolies, the valuation of S.O.E.s, modes of privatisation, the use of proceeds from the programme, and the conversion of private companies into public companies. These will now be discussed individually.

2.1 SPECIAL OR GOLDEN SHARE

The Act provides for a golden share to be held by the government. This golden share is defined as:

"a share with special rights to enable the government in the national interest to intervene in the operations of a company, which intervention is caused by specific actions undertaken by the company."⁸

The Bill used the term *"for strategic and defensive reasons"* but this was amended to prevent a situation where the government arbitrarily acquires such shares, as happened with the nationalisation of the milling industry in 1986.⁹ The Act empowers the Minister responsible for Finance to retain a share in a state-owned enterprise and convert such share into a golden share upon the advice of the National Assembly.¹⁰ The Minister of Finance, in his speech to Parliament in June 1992, outlined the following instances as occasions when a golden share can be activated:¹¹

- (a) When there is a risk of take-over bids;
- (b) In the case of voluntary winding-up;
- (c) Where an excessive concentration in share ownership is attempted;

8 *Section 2*

9 *Parliamentary Debates, 16th June - 9th July, 1992, p.111*

10 *Section 2*

11 *Parliamentary Debates, 16th June - 9th July, 1992, p.111*

- (d) In a situation in which a major lay-off or closure of plants is contemplated;
- (e) Where there is mismanagement of company affairs; and
- (f) Where majority voting powers pass into foreign hands.

When the Zambian version of the golden share is compared with the U.K. version of a special share, upon which the former is modelled, it will be noted that the instances in which a golden share can be activated are similar in both systems.¹² The term "golden share" signifies that government is allotted a share in an otherwise privatised enterprise. Government agrees not to participate actively in the company's management processes except in the instances outlined above. It is a helpful device in sectors where some kind of public surveillance is necessary and where government protection of the national interest is vital.¹³

Various criticisms have been levelled against the idea of a golden share. It is argued that a special share effectively diminishes the forces of the market place in so far as, for example, a justifiable take-over bid for an inefficient privatised firm may be rejected out of hand by government.¹⁴

12 V.V. Ramanadham, p.78

13 Ibid., p.24

14 P. Cunwen, *Public Enterprise, A Modern Approach*, (Sussex: Harvester Press, 1986), p.615

Hence, it frustrates the drive to be efficient. It cannot be disputed that a government can act in bad faith but there should be some form of legal safe-guard to prevent such abuse.

In the Zambian context, the Act, by stipulating that the Minister of Finance has to seek the advice of *National Assembly* in order to acquire a golden share in any industry, implies that in essence it is the National Assembly which will interpret the question of whether or not such acquisition will be in the national interest. This is a legal safe-guard against the abuse of power by government. On the other hand, in the event of government activating its special share, it is not clear whether or not in this instance the government is accountable to Parliament. The Act is silent on this aspect.

The "golden share", together with limits on individual shareholding (that is the maximum number of shares an individual can hold in a privatised S.O.E.), are characteristic of most of the major privatisation programmes in the world.¹⁵

2.2 TRANSPARENCY

This is one of the major objectives of the Act and one of the most important elements that determine the success or otherwise of a privatisation programme.¹⁶ It is the means by which members of the public, potential investors and the international community will have confidence in the programme.¹⁷ To realise this objective, certain provisions were included in the Act.

The Act provides for the establishment of the *Zambia Privatisation Agency (ZPA)*.¹⁸ The ZPA is incorporated, that is registered, under the *Companies Act, Cap 686 of The Laws of Zambia*. However, this is not to say that it is a private company. It is a state-owned enterprise or a parastatal.

15 Ibid

16 *Parliamentary Debates, 16th June - 9th July, 1992, p.102*

17 Ibid.

18 *Section 3*

In the *1992-1994 New Economic Recovery Programme*, government stated that no new parastatals would be created unless such parastatal was incidental to the implementation of the privatisation programme.¹⁹ The creation of the ZPA, therefore, falls within this exception.

The Act then proceeds to deal with the composition of the Agency.²⁰ Of the twelve members that constitute the *Board* only three are government officials, namely the *Attorney General* and the *Permanent Secretaries* in the Ministry of Finance and the Ministry of Commerce, Trade and Industry. The three bureaucrats are excluded from holding the posts of *Chairman* and *Vice-Chairman* of the Agency²¹ to avoid a situation in which government is seen to be taking the initiative in the privatisation programme and not the private sector, as the case should be.²² For the same reason, Ministers and Deputy Ministers are not directly included as members of the Agency. However, since the programme involves the divestiture of government enterprises, government has to be represented so that it monitors the progress of the programme.

19 *New Economic Recovery Programme: Economic And Financial Policy Framework*, 1992-1994, paragraph 29

20 *Section 5*

21 *Section 5(2)*

22 *New Economic Recovery Programme*, para. 29

The President appoints members of the Agency, but these appointments are made on the basis of recommendations from the bodies that are represented on the Agency. For example, the *Bankers Union* nominates its own candidate and then presents the nomination to the President. These appointments are then subject to scrutiny by *National Assembly*. This provision for *ratification* is viewed as one of the major strengths of the Act, as it seeks to prevent a situation in which appointees are mere political puppets. The Privatisation Bill did not have this provision for scrutiny and ratification by the National Assembly and it is important that the legislators noted the dangers such an omission would have posed. A body which is given the task of implementing a privatisation programme must be seen to be independent of government interference, otherwise public confidence in the programme will be undermined.

In order to maintain confidence in the privatisation programme, the Act imposes an obligation on the ZPA to publicise the activities of the programme.²³ As regards what is to be publicised, the Act provides that the Agency has to publish in the *Gazette*, *inter alia*, names of the approved state-owned enterprises to be privatised.²⁴

23 Section 8(2)(o)

24 Section 38(1)(a)

The conduct of the Agency must be of the highest standard, hence those directly involved in the privatisation programme will not be able to participate in the programme. To this effect, the Act places employees of the Agency, Consultants and their spouses who are directly or indirectly interested in a private or professional capacity in any matter relating to the privatisation programme under a duty to disclose their interests.²⁵ This same group is precluded from purchasing shares in any companies scheduled for privatisation unless the sale is by public offer of shares.²⁶

Similarly, to avoid a situation in which the public feel that politicians and other persons in high office are manipulating the programme, the Act provides that political leaders and public officers should publicly disclose their intention to bid for the purchase of shares in a S.O.E.²⁷ Initially, the Act did not define the terms "*political leader*" and "*public officer*", and the terms were thought to be highly controversial as a result. For instance, it was argued that a Trade Unionist could be called a "public officer".²⁸

25 *Section 14*

26 *Section 25*

27 *Section 26*

28 *ZPA Progress Report No. 2, 1st January, 1993 to 30th June, 1993, p.15. See also Times of Zambia, 6th January, 1994*

In the same manner, the term "political leader" could be taken to include leaders of political parties other than the ruling party. The other problem was that the public felt that persons holding high office, namely top government officials, were likely to enrich themselves from the privatisation programme.²⁹

It was therefore felt that legislation should be enacted to regulate the acquisition of shares in privatised S.O.E.s by political leaders and public officers, and also to define the two terms. To this effect, *The Privatisation (Political Leaders and Public Officers)(Bidding) Regulations, Statutory Instrument No. 64 of 1994* was passed by Parliament. These Regulations define "political leader" to mean any of the following persons or their spouses:³⁰

- (a) the President, Vice-President, Speaker of National Assembly, Minister, Leader of the Official Opposition in Parliament, Deputy Speaker, Deputy Minister and Member of Parliament; and*
- (b) members of the executive of all registered political parties.*

29 Interview With Mr. Matanda, Publicity And Marketing Manager, Z.P.A., 10th October, 1994.

30 *Section 2(1)(a),(b)*

The Regulations further define "public officer" to mean any of the following persons or their spouses:

*State House Chief of Staff, Secretary to the Cabinet,
Special Assistant to the President, Deputy Secretary to
the Cabinet and Permanent Secretaries.*

The Privatisation Act also makes it mandatory for a potential investor to disclose his interest in a S.O.E.³¹ Parliament enacted this provision to avoid the scenario that existed in the past when it was difficult to know who were the actual owners of certain enterprises in Zambia because most foreigners purchased such companies through Zambians.³²

Under the privatisation programme, an atmosphere of transparency in the ownership of enterprises is vital. However, enforcement of this provision could prove difficult due to lack of time and also due to the fact that legal documents pertaining to these enterprises are in most cases in disarray and very difficult to locate.

31 *Section 27*

32 *Parliamentary Debates, 16th June - 9th July 1992, p.102*

The valuation of parastatals is a contentious issue and the transparency of the valuation exercise is therefore necessary. The Act stipulates that such valuation shall be performed by *independent valuers*.³³ These are therefore selected from industrial experts from sectors in which the enterprise being privatised operates.³⁴

On the aspect of negotiations for the sale of S.O.E.s, the Act empowers the Agency to appoint an independent negotiating team for each sale.³⁵ It is mandatory that the teams so appointed are independent. The Act outlines the elements that must be considered when appointing such teams, for example professional qualifications.

The Chairmen of these teams are prominent Zambian professionals who are in either full-time employment or run their own businesses. For example, in Tranche Two (that is the second group of companies that were privatised), three teams were organised, consisting of an independent Chairman, an independent Lawyer, a representative of ZIMCO, two ZPA staff, and a Consultant to the ZPA.

33 *Section 23*

34 *ZPA Progress Report No. 2, p.44*

35 *Section 32*

These teams were advised by the firms that prepared the company privatisation studies.³⁶ The latter are private firms contracted by the ZPA. These independent negotiating teams have sometimes proved to be an obstacle in that the time that the members could devote to the negotiations had to be reconciled with their other commitments. Therefore, in certain cases, negotiations are bound to be protracted. Another way of ensuring that there is transparency in the programme is the mandatory requirement for the Agency to present a Report to the Minister who in turn shall present it to the National Assembly.³⁷ Such report must be made available for sale to the public.

The main purpose of this provision is to keep the National Assembly informed of the progress of the privatisation programme.³⁸ As matters stand at the moment, the ZPA is finding it difficult to comply with this statutory obligation in that, due to financial constraints, *Progress Reports* are not readily available to the public. The statute stipulates that such report should be made available every six months. At present, the latest Progress Report is dated *1st January, 1993*.³⁹

36 *ZPA Progress Report No. 2*, p.44

37 *Section 44*

38 *Parliamentary Debates, 16th June - 9th July, 1992*, p.252

39 Interview With Head - Legal Counsel, ZPA, 2nd August 1994

2.3 OWNERSHIP

The question of ownership is vital to the privatisation programme. The main objective of the programme is to obtain the optimum mix of foreign and Zambian participation in order to maximise new investment, encourage wide share ownership, and improve the efficiency of enterprises.⁴⁰ At present, the average Zambian does not have the financial ability to actively participate in the privatisation programme.⁴¹

In order to overcome this problem, the *Privatisation Trust Fund (PTF)* was established, pursuant to the Act, to acquire shares of newly privatised enterprises from the ZPA for subsequent sale to investors by way of public offering to achieve a wide distribution among citizens of Zambia and to obtain a level of sale proceeds consistent with the companies value, investment conditions and economic circumstances at the time.⁴² Persons wishing to buy shares must provide their own capital. However, the modalities of how shares will be sold have not yet been worked out.⁴³

40 *Parliamentary Debates, 16th June - 9th July 1992, p.111*

41 *Ministry of Commerce, Trade and Industry; Technical Committee On Privatisation: Privatisation Programme In Zambia, July 1991, p.7 (Unpublished)*

42 *Ibid*

43 *Interview With Mr. Matanda, Publicity And Marketing Manager, Z.P.A., 10th October, 1994.*

The Act provides that:

*"The Minister responsible for Finance shall establish a Privatisation Trust Fund in which the government shall hold shares in trust for citizens for divestiture after a state-owned enterprise has been privatised."*⁴⁴

The Act also prescribes concessions to be offered to Zambians citizens, such as offering a discount to persons who purchase a small number of shares.⁴⁵ The PTF is a *"temporary vehicle"* to act as a buffer until the *Stock Market* capacity to purchase all the shares offered at a reasonable price is fully developed.

The PTF will no longer be needed, as is the case with other existing *Stock Exchanges* around the world.⁴⁶ The *Trust Deed* establishing the PTF was executed by the Minister of Finance and five trustees on 17th June, 1993.⁴⁷

44 Section 29

45 Section 29(2)

46 ZPA Progress Report, No. 2, p.21

47 Ibid.

The proceeds from the PTF will then be transferred to the *Privatisation Revenue Account* established under the Act.⁴⁸ The ZPA is to consult with the PTF at the time of privatising S.O.E.s and offer to the PTF shares in such newly privatised enterprises as the ZPA considers appropriate. The PTF then considers the suitability of proposed investment. In so far as is practicable, shares are to be sold by way of the *Lusaka Securities Exchange (LuSE)*. The PTF must, at the end of each accounting period, provide a report of shareholding proceeds and distributions to the ZPA. Guidelines and restrictions on the acquisition and divestment of shares by the PTF are also laid down in the Trust Deed, which can be bought by the public for a nominal fee from the PTF and the Ministry of Finance.⁴⁹

The government generally intends to ensure the eventual transfer of shares to Zambians in the following instances; namely through phased divestment by government whereby a portion of the shares is retained for sale at a later date, and also as a condition of the sales agreement whereby the investor agrees to float a portion of the company for Zambian and/or public participation.⁵⁰

48 *ZPA Progress Report No. 2, p.21*

49 *Section 29*

50 *ZPA Progress Report, No.2, p.21*

The idea of the PTF is commendable. However, whether or not it will be a success largely depends on the financial capacity of Zambians. Unless the economy improves and enables Zambians to have enough money to participate in the privatisation programme, it may take several years before the PTF becomes a working reality.

It should be noted that public floatation of shares is provided for under the Act. Equity investment, that is investing in shares, is associated with a certain amount of risk and unsophisticated investors may not understand the techniques to assess the potential returns for an investment or to assess worthwhile investments.⁵¹ Therefore, in the initial stages only large, high-profile enterprises with sustainable profit will be publicly floated.⁵² It has also been noted that some companies, for example the *Zambia National Broadcasting Corporation (ZNBC)*, due to their strategic nature, should be controlled by Zambians. In such companies, it has been proposed that two classes of shares should exist, where Zambian shares have greater voting rights although both classes will have equal dividend rights. This will entail proper legislation, either being incorporated under the Privatisation Act or a separate *Statutory Instrument*, stating how a particular company will be privatised.⁵³

⁵¹ Ministry of Commerce, Trade and Industry, *Technical Committee On Privatisation (Unpublished)*, p.7

⁵² Ibid

⁵³ Ibid

It cannot be disputed that the Zambian government has gone to great lengths to ensure that Zambian citizens are afforded a chance to participate in the privatisation programme. However, whether or not this objective will be successful will depend, to a great extent on the improvement of the financial capacity of Zambians, and unless the economic situation improves this is not likely to happen in the very near future.

The Act also aims at encouraging foreign investment in certain areas. The Act stipulates that:

"Foreign investors shall be entitled to incentives under the Investment Act, if such investor acquires shares in a state-owned enterprise where :-

- (a) expertise is needed to upgrade efficiency of the state-owned enterprise;*
- (b) participation is necessary to promote the export market;*
- (c) the nature of the business requires global linkages and international exposure; or*
- (d) capital investment or foreign technology is required to expand the capacity of the business operations."⁵⁴*

The Act has made an important contribution in that the term "*foreign investor*" is defined as:

*" A person, being a citizen of Zambia or not, who brings into Zambia foreign exchange for the purchase of shares in a state-owned enterprise or for additional investment in a state-owned enterprise."*⁵⁵

It is important that the citizens who can compete on an equal basis with non-Zambians in terms of financial capacity are not denied the opportunity to participate in and benefit from such provisions. This widens the scope of potential investors and maintains confidence in the programme.

2.4 PREVENTION OF THE CREATION OF MONOPOLIES

The major objective of privatisation is to create competition and hence avoid the creation of *monopolies*. The Act thus provides that one of the functions of the ZPA is to prevent the creation of monopolies in the process of privatisation.⁵⁶

55 Section 30 A(a)

56 Section 8(2)(j)

To this effect, in an attempt to encourage competition, state monopolies will be broken up into units before privatisation. For example, *Zambia Breweries Limited*, was a state-owned monopoly which fell under *Tranche Two* of the Privatisation Programme. It was decided that the best way of privatising this enterprise was by breaking it into two units. Negotiations with *Anglo-American (ZAMIC)*, the minority shareholders, resulted in ZAMIC agreeing to take over the Lusaka brewery and giving up their rights of pre-emption in the Ndola brewery. The latter was offered on a competitive tender following the sales agreement signed by the Minister of Finance on *24th August, 1994*,⁵⁷ and ZAMIC's pre-emptive rights have been waived.

However, it should be noted that in certain situations, private monopolies are unavoidable, especially when it is difficult to break up an enterprise into units. therefore, a *Competition Law* will be enacted to ensure fair trading. Protectionist policies will also not be permitted.⁵⁸ Prevention of creation of monopolies is essential in that the major objective of any privatisation programme is to ensure competition, and therefore monopolies would undermine the concept underlying privatisation.

57 Interview With Mr. Matanda, Publicity And Marketing Manager, Z.P.A., 10th October, 1994.

58 Interview With ZPA Head Legal Counsel, 2nd August, 1994

2.5 THE VALUATION OF STATE-OWNED ENTERPRISES

The Act has outlined the manner in which a state-owned enterprise is to be valued. this is vital to ensure that the correct procedure is followed. Valuation of an enterprise is not a precise science. Its aim is to provide a range of possible values as a yardstick before a price is established by the government, or by negotiation, or by the market. Valuation thus provides a measure against which the suitability or acceptability of a given price may be judged.⁵⁹

This valuation of a S.O.E. assists the ZPA in complying with a later provision of the Act which states:

*"The Agency shall ensure that each state-owned enterprise is sold for its market value."*⁶⁰

The Act has, however, not defined the term "*market value*". In economics, the market value is defined as that price agreed between a willing buyer and a willing seller.⁶¹

59 H. Sasson, *The Conceptual Framework And Practicalities Of Privatisation Programme Implementation*; Seminar On Privatisation For MPs, Mulungushi Conference Centre, 10th February, 1992.

60 *Section 22*

61 *ZPA Update, 30th November, 1993, p.12*

The ZPA performs two main types of valuation: an *asset valuation* and a *company valuation*.⁶² Non-performing assets, such as residential properties, are identified separately and these assets are valued at their market value by independent real estate valuers. The sum of these values provides an indication of what it would take to reconstruct the S.O.E. with the same assets it already owns.⁶³

The company valuation, on the other hand, is the valuation of the operating business by assessing the worth of the business as a going concern. Factors such as forecasts to assess the market, both existing and potential, the likely costs of production and other issues, are taken into consideration. The company valuation is an estimate of the value that a reasonable investor would be prepared to pay for the business.⁶⁴ Although the Act does not clearly define these two types of valuation, it provides the procedures to be followed when performing a company and an asset valuation.⁶⁵

62 Ibid

63 Ibid

64 F. Dogliotti, *Valuation Approaches And Methods*, Euromoney Privatisation Course: Privatisation In Southern Africa , Johannesburg, South Africa, 26 - 29th January, 1993, p.1

65 Section 23

It is important that the Act has gone to great lengths in outlining the valuation procedure. This prevents or minimises problems arising due to the valuation of enterprises.

2.6 MODES OF PRIVATISATION

The selection of a *divestiture mode* depends on the objectives of the overall privatisation programme and also of the individual privatisation, together with the nature of the shares or assets being divested. It is therefore necessary to carry out a case-by-case analysis of all enterprises being privatised.⁶⁶

It should be understood from the outset that each divestiture programme that will be contemplated and implemented will differ from every other divestiture programme. Each privatisation will involve a unique set of circumstances, creativity and clear-cut decisions. It is, therefore, noteworthy that the ZPA is not restricted to the modes of privatisation that are listed under the Act,⁶⁷ as this provides the Agency with latitude when faced with complex privatisations.

66 H. Sasson: *The Conceptual Framework And Practicalities Of Privatisation Programme Implementation* (1991), p.98

67 *Section 22(h)*

The *Privatisation Act* has outlined the following methods of privatisation⁶⁸ or divestiture:

Public Offering of Shares - This is the process whereby a company offers its shares to investors (that is management, employees, citizens and foreigners). It is the offering of the shares of a company to the public, but it must be a *Public Company* which does so as a *Private Company* is barred by law from offering its shares to the public.⁶⁹ Of the approximately one hundred and fifty companies to be privatised, probably no more than thirty companies are good candidates for public floatation on the *Stock Exchange*.⁷⁰

*Trade Sales or Private Sales*⁷¹ - These are the most common form of privatisation in developing countries. Enterprises sold in this manner are either too small to be floated on the Stock Exchange or the business risk associated with the company and its products are significant. Such enterprises are offered for trade sales using an *open competition tender* system.

68 *Section 22*

69 R.R. Pennington, *Company Law*, (London: Butterworths, 1979), p.606. See also *Section 5 of the Companies Act, Chapter 686 Of The Laws Of Zambia*

70 *ZPA Information Pamphlet*

71 *Section 22(b)*

This allows for investors who have appropriate technical expertise and business enterprise to own and run such a company and take the risk to ensure its viability.⁷² The other situation in which a trade sale can be utilised is when the government, as the majority shareholder, sells to an existing minority shareholder. Trade sales are dependent on the financial ability of the business sector to acquire enterprises through direct sales.⁷³

The government can also offer additional shares in a state-owned enterprise in order to reduce its shareholding.⁷⁴ This is done when government wishes to retain shareholding in a privatised S.O.E. as a minority share-holder.⁷⁵ The sale of assets and businesses of the S.O.E.s⁷⁶ is often made to private sector purchasers, who may be employees, management, private individual investors, trade buyers, or institutional investors,⁷⁷ and the reason for such a sale, *inter alia*, may be because there is a chance of realising a higher income in this manner.

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- 72 H. Sasson, *Privatisation: The Conceptual Framework And Justification*, (1991), pp.3 & 4
- 73 *Ibid.*, p.9
- 74 Section 22(c) of the Privatisation Act
- 75 H. Sasson: *Privatisation - The Conceptual Framework And Justification*, (1991), p.8
- 76 Section 22(d)
- 77 *Inter-regional Network On Privatisation* (UNDP, 1989), p.71

*Management buy-outs*⁷⁸ involve personnel who normally do not possess the resources needed to pay for the shares being acquired. However, they possess the ambition, good inside knowledge of the enterprise's true potential, and the willingness to commit to the enterprise a significant part of their limited personal wealth. The cash needed is often borrowed from banks and other financial institutions.⁷⁹

*Leasing and management contracts*⁸⁰ are also provided for in the Act. In the latter, the government pays a private company a fee for managing the S.O.E.. Such contracts are common in hotels, airlines, and in agriculture, as they are less politically contentious. In order to be effective, management contracts require legal safeguards to be developed and enforced by monitoring, as there is a risk that the contractor may run down the assets.⁸¹

78 *Section 22(f)*

79 H. Sasson: *The Conceptual Framework And Practicalities Of Privatisation Programme Implementation* (1991), p.9

80 *Section 22(g)*

81 H. Sasson: *The Conceptual Framework And Practicalities Of Privatisation Programme Implementation* (1991), p.9

Leases, on the other hand, overcome some of the drawbacks of management contracts in that the party which contracts with the government assumes the commercial risk of operation and maintenance, and therefore has greater incentives and obligations to reduce costs and maintain the long-term value of the assets.⁸² Lease arrangements have been widely used in Africa, particularly in sectors in which it is difficult to attract private investors.⁸³ Prior to the privatisation of a S.O.E., the government may need to *re-organise or restructure*⁸⁴ in order to make the enterprise more attractive to investors, and it may involve the settlement of *liabilities* by the government on behalf of the enterprise.⁸⁵

2.7 ✓ THE USE OF PROCEEDS FROM THE PRIVATISATION PROGRAMME

In any privatisation programme, it is important that funds are properly accounted for. This prevents a situation in which there is lack of accountability which can result in the lack of confidence in the programme by the public.⁸⁶

82 Ibid

83 Ibid

84 *Section 22(e)*

85 *Inter-regional Network On Privatisation (UNDP, 1989), p.71*

86 Ibid

The Act provides that:

"Any proceeds from contemplated sales of shares and assets shall be paid into a Privatisation Revenue Account established by the Minister responsible for Finance, and held at the Bank of Zambia."⁸⁷

Basically, any such proceeds will be used to finance the privatisation programme, for instance to support the *payment of redundancy packages*.⁸⁸ The Act has clearly outlined the uses of the funds and the procedure to obtain these funds. It is, therefore, imperative that this provision is strictly adhered to, in order to avoid a situation in which the public are of the view that funds are not being properly accounted for.

2.8 THE NATURE OF ENTERPRISES BEING PRIVATISED

Having looked at the basic features of the Act, it is necessary to analyse the nature of the enterprises being privatised.

87 *Section 39*

88 *Section 39(2)(h)*

These enterprises are companies, and the term "*company*" can be taken to mean:

*"A corporation, in the eyes of the law a person, quite distinct from the individuals who are its members. It therefore has rights and is subject to liabilities, and it can also own property."*⁸⁹

Two types of companies exist, namely *public* and *private companies*. Various elements distinguish one from the other. But of particular interest to this Paper is that public companies can invite members of the public to *subscribe* for its shares unlike a private company.⁹⁰ Therefore, only public companies can float their shares on the *Stock Exchange*. The process of privatisation can, therefore, theoretically only occur in a public enterprise. However, in Zambia, most of the enterprises being privatised were *incorporated* under the *Companies Act* as private companies. It may sound rather ironic that some companies that are being privatised are in essence private companies.

It was earlier stated in *Chapter 1* that parastatals which are S.O.E.s are in effect public companies incorporated under the *Companies Act*, Chapter 686 of the Laws of Zambia as private companies.

89 R.R. Pennington, p.36

90 *Companies Act, Cap 686, Section 5(b)*

In order for them to be privatised, the Privatisation Act provides that:

*"The Agency may convert a state-owned enterprise scheduled for privatisation, which is not a public company into a public company in accordance with the provisions of the Companies Act."*⁹¹

No statutory definition is given of a parastatal, but generally a parastatal can be defined as:

*"An organisation which is not an integral part of government, but an institution, organisation or agency which is wholly or mainly financed or owned or controlled by the government. The criterion of such public enterprise would be ownership by the government of 51 percent or more of the capital shares or forms of government participation or effective influence in all the main aspects of management of the enterprise."*⁹²

The term "*share*" has been widely used when discussing the privatisation programme. It gives its owner proportionate ownership of a company but not of its assets, which are owned by the company itself.

91 Section 33

92 M. Ndulo, (ed.), *Law In Zambia*, (Nairobi: East African Publishing House, 1984), p.211

Ownership of such a share confers rights and imposes liabilities under the general contractual framework of the company's constitution, that is the *Memorandum of Association* and the *Articles of Association*.⁹³

2.9 PRELIMINARY CONCLUSIONS

It can be said that the Act relating to privatisation in Zambia has more or less addressed the main issues that an overall Privatisation Act should address. The Act has, at least, attempted to address the following issues, namely the valuation of enterprises, the manner in which enterprises are to be sold, the utilisation of divestiture incomes, a special or "golden" share, accountability to the public. Issues such as settlement of disputes and the aspect of eligible buyers have also been addressed.

However, one interesting feature that the Act has not tackled is that of *pre-emptive rights* of minority share-holders. This issue has attracted the attention of the public because wide share ownership is a major objective of the Act, and there is a common view that this stands to be defeated since most parastatal companies lined up for privatisation would be bought by existing minority share-holders, who are mostly multi-national companies, since legal arrangements give them priority to buy these companies.

Pre-emptive rights are embedded in the Articles of Association of a company. When any of the shareholders intends to sell his shares, the remaining shareholders have first priority to buy, and only when they decline can the shares be offered to the public. During *nationalisation*, the government, through ZIMCO, entered into legal arrangements with private firms (usually foreign) that required that, in the event of a sale, an offer of the selling shareholder's shares had to be made to the remaining shareholders at a price to be set by the seller.⁹⁴

In Zambia, most of the profitable parastatals have minority shareholders with pre-emptive rights. Critics argue that most of these companies will therefore be bought by the minority shareholders who, in most cases, happen to be foreign multi-nationals such as *Anglo-American Corporation (AAC)*, *Phelps Dodge*, *Tate and Lyle* and the *Commonwealth Development Corporation (CDC)*. The main argument is that there will be few attractive parastatals left for new investors. For instance, ZCCM has such minority shareholders as AAC, and, under the terms of the nationalisation agreement, AAC has pre-emptive rights if the government's shares fall below 50 percent.⁹⁵

94 *Financial Mail*, 10 - 16th May, 1994

95 *Ibid*

The question of pre-emptive rights should, however, not be seen as an obstacle for the success or otherwise of the privatisation programme. In some cases, the minority shareholders do waive their rights in order to assist in the success of the programme. For instance, in the case of *Zambia Breweries Limited*, the minority shareholders, ZAMIC, have waived their rights in the Ndola Breweries plant in order to provide competition in the industry. It should also be noted that if shareholders are in conflict as to whether or not an enterprise should be broken into units in readiness for privatisation, the majority shareholders, who happen to be the Zambian government, can exercise their voting rights and the minority shareholders stand to be defeated.⁹⁶

On the other hand, the price of shares being sold is a difficult issue. The sale of *Metal Fabricators of Zambia (ZAMEFA)* has stalled because the independent negotiation teams failed to reach an agreement on price, and therefore the provisions of the Memorandum and Articles of Association were invoked. These call for an independent valuation by the company's *Auditors*.

If the minority shareholders do not agree to the price, then the ZPA has the right to offer the shares to a third party on the same terms and conditions as those offered to the minority shareholders.⁹⁷ The latter part is rather controversial in that the validity of such an action by the ZPA does not seem to have legal backing. Rather than create an atmosphere of confrontation, it would be a much wiser course to settle such a dispute under the Act, which provides that:

*"Any dispute arising from the privatisation process shall be settled by arbitration with the Arbitration Act."*⁹⁸

Therefore, although it might appear as though pre-emptive rights pose a problem to the privatisation programme, this does not seem to be the case.

97 ZPA Update, 30th November, 1993, p.13

98 Section 47

Chapter 3

3.0 SUPPORTING LEGISLATION AND THE STOCK EXCHANGE

3.1 SUPPORTING LEGISLATION

The process of divestiture or privatisation is dependent on legal issues. These permeate the whole process from preparation to implementation and follow-up.⁹⁹ To begin with, existing legislation as well as the legal status of the S.O.E.s to be divested must be analysed in order to determine whether they allow for privatisation and are compatible with the government's objectives or need to be amended.¹⁰⁰ For instance, competition is a major objective of any privatisation process and, often, there will be need to enact a *Competition Law*.

A well functioning legal framework is therefore imperative to a successful privatisation programme. Important aspects of business legislation, such as *property law*, *competition law* and *corporate law*, should be developed.¹⁰¹ No branch of law in a market economy that is created by the privatisation process is an island unto itself.¹⁰²

99 Privatisation: *The Lessons Of Experience*, World Bank Report, 1992

100 Ibid

101 European Economy: *Shaping A Market System - Legal System*, (1993), p.71

102 Ibid., p.75

Cohesive interaction is a critical element and the aim is to guide the market economy in as limited and flexible manner as possible, that is intervening only where essential.¹⁰³ Country experiences of privatisation provide adequate evidence. For example, after the break-up of the *Russian Federation*, the new *Independent States* embarked upon privatisation programmes. These states have carried out various legal reforms in order to facilitate privatisation. As a result, their privatisation programmes are proceeding more or less smoothly and the privatised industries are able to develop. It has also resulted in the protection of consumers, competitors and tax-payers.¹⁰⁴ Attempts have been made to reform *Tax laws, Company Laws, Labour Laws, Investment Laws, Banking Laws, Competition Laws, and Unfair Trading Laws.*¹⁰⁵

In *Northern Ireland* it was realised that abuse of market power by dominant companies can occur in various forms, for example through anti-competitive practices such as preventing entry by excessive pricing of goods and services. It was found necessary to ensure that reforms were made to the Competition Law.¹⁰⁶

103 **Ibid**

104 **Privatisation: *The Lessons Of Experience*, World Bank Report, 1992, p.20**

105 **Ibid**

106 ***Competition Law Reform*, Northern Ireland Legal Quarterly, (1993), p.291**

Taiwan, which has emerged as one of the world's most dynamic market economies, embarked on extensive reformation of the legal framework in order to push for *economic liberalisation*, in general, and privatisation, in particular.¹⁰⁷ Amongst legislation that was reviewed were the Banking Laws, Fair Trade Laws and Investment Laws.¹⁰⁸

At a Conference held in *Johannesburg, South Africa* in 1993, whose theme was "*Privatisation In Southern Africa*" great emphasis was placed on the fact that:

*"Any privatisation exercise should be undertaken against a well-structured legal and policy framework. The purpose of this is to provide the supporting structure against which the privatised company and associated institutions will operate."*¹⁰⁹

Amongst the most pertinent observations that were made was the fact that there was need to provide a basic framework for monitoring the development of a competitive environment.

107 Law And Policy In International Business: *Taiwan's Privatisation Drive*, (1993), p.943

108 Ibid

109 Euromoney Privatisation Seminar: *Privatisation In Southern Africa*, (1993)

Existing legislation, it was pointed out, must be reviewed in order to make legal changes necessary to achieve privatisation. Legislation which was singled out as needing immediate review was:

- *Labour Legislation*, which deals with the relationship between employer and employee;
- *Company Legislation*, which provides for the registration and recognition of companies and corporations as separate legal entities;
- *Property Legislation*, which provides for the registration of *Title Deeds* and other real rights;
- *Tax Legislation*, which deals with corporate and personal income tax.

After a complete study has been carried, existing legislation should be amended or new legislation should be drafted.¹¹⁰

From the above cited examples, it appears that a country cannot hope to have a successful privatisation programme if it does not endeavour to carry out a thorough review of its existing legislation to ensure that the legal framework will promote privatisation.

The Zambian Government has similarly embarked on a reformation of the legal framework, and the following pieces of legislation have been identified as needing immediate action:¹¹¹

3.1.1 COMPETITION LAW

It is government's policy to encourage competition in the liberalised economy.¹¹² Greater competition is to be encouraged in the provision of financial services such as Insurance, Pensions and Building Society funds. Monopoly rights will therefore be removed from state enterprises, and in some cases the enterprises themselves will be privatised in view of the privatisation exercise. The government will introduce *anti-monopoly legislation* in the form of a *Competition Law* to guarantee competition and avoid *cartels*.¹¹³

A Competition Law provides a basic framework for the monitoring of the development of a competitive environment. Its purpose is to maintain and promote competition in the economy, to prevent or control restrictive practices and the acquisition of controlling interests in certain businesses or undertakings in certain assets.¹¹⁴

111 Parliamentary Debates, 23rd July, 1993

112 *New Economic Recovery Programme*, 1992 - 1994, para. 34

113 Ibid

114 **Euromoney Privatisation Seminar: *Privatisation In Southern Africa***, January, 1993

The main principles that will be applied to the Privatisation Programme are basically the following:-¹¹⁵

- private monopolies will be discouraged;
- where monopolies are unavoidable, the Competition Law, which is yet to be enacted, is meant to ensure fair trading;
- where possible, S.O.E.s will be broken up into their component parts so as to provide competition in the industry in which they operate;
- sector studies will be performed to ensure that the privatisation of S.O.E.s will enhance competition in that sector; and
- protectionist policies will not be condoned, and S.O.E.s and private sector enterprises will not enjoy specific privileges.¹¹⁶

At this point, it would be best to see how other countries have formulated their Competition Laws. The *South African* approach has been that the purpose of a Competition Law is to prevent or control restrictive practices and the acquisition of controlling interests in certain businesses or assets.¹¹⁷ The South African Competition Act establishes a *Competition Board*.¹¹⁸

115 Ibid

116 Ibid

117 Euromoney Privatisation Course: *Privatisation In Southern Africa*, 1993

118 Ibid

The Act goes on to define the term *restrictive practice* in broad terms as being:

"any business practice or situation which, by directly or indirectly restricting competition, has or is likely to have the effect of preventing or restricting the entry of new producers or distributors into a branch of trade or industry."

Therefore, where an entity is already or becomes a monopoly, the interests of the users need to be protected against monopolistic abuse. This is a situation in which a monopoly takes advantage of its status and provides goods or services of an inferior quality.¹¹⁹ In this case *economic regulation* becomes a necessity.

In *Britain*, restrictive practices are dealt with through an investigations process, which is conducted by a *Monopolies and Mergers Commission* (note that most Competition Laws make provision for a Board or Commission to carry out such investigations).

Abuse of market power is also regulated by the anti-competition practices laid down in the Act which prohibit:¹²⁰

"a course of conduct which has or is intended to have or likely to have the effect of restricting, distorting or preventing competition"

This provision is similar to the South African provision cited earlier on. Both, it will be noticed, provide a wide meaning to the term. The Commission in the U.K. Act also carries out similar duties to the Competition Board set up under the South African Act.¹²¹ Certain weaknesses have, however, been identified in the British Act which Zambia should take heed of.

The first weakness is that the competition legal framework has limited effect and that it has a narrow approach with respect to enforcement.¹²²

The second weakness is that enforcement is restricted to the *Director-General of Fair Trading* or the *Secretary of State*.

120 *"Competition Law Reform" - Northern Ireland Legal Quarterly.* p.291

121 See *Privatisation In Southern Africa* Conference Papers

122 *"Competition Law Reform" - Northern Ireland Legal Quarterly,* p.291

Third parties can only assert their rights through the process of judicial review challenging the exercise of this power, a very lengthy and costly exercise which is unlikely to prove successful.¹²³ The third weakness is that the legal framework provides a very weak deterrent against monopolistic or anti-competition practices.

The final example is that of Taiwan, which has established an effective *Fair Trading Law*.¹²⁴ Taiwanese Law stipulates that a monopoly exists where an enterprise faces no competition, while an *oligopoly*¹²⁵ exists where firms create a monopolistic condition among themselves and do not engage in price competition with each other. While such enterprises are not banned, they are heavily regulated in their pricing and competition policies.

The Fair Trade Law also establishes a Commission to review and prohibit planned mergers and combinations in order to discourage creation of new monopolies. The Fair Trade Law aims to combine anti-trust and unfair competition regulations, and it also establishes a *Fair Trade Commission*¹²⁶ to oversee both.

123 Ibid

124 Law And Policy In International Business: "Taiwan's Privatisation Drive," (1993), p.978

125 Ibid

126 Ibid

3.1.2 THE INVESTMENT ACT, NO. 39 OF 1993

In order to create an improved climate for private investment and the private sector, the Zambian government embarked on an exercise to remove legal and administrative obstacles so as to facilitate investment in the country.¹²⁷

The first attempt in this area was the enactment of the *Investment Act* of 1991 which was repealed by the Investment Act No. 39 of 1993, which states in its preamble that it is:

"An Act to revise the Law relating to Investment in Zambia so as to provide a comprehensive legal framework for investment in Zambia; to repeal the Investment Act, and to provide for matters connected with or incidental to the foregoing."

An *Investment Centre and Board* were established under the 1991 Act and maintained by the 1993 Act for the purpose of promoting, coordinating government policies on investments and, facilitating investments in Zambia.¹²⁸

127 *The New Economic Recovery Plan, 1992-1994, para. 30*

128 *Part II of The Investment Act, 1993*

The Privatisation Act encourages both local and foreign investment and offers incentives to both groups of investors. The Privatisation Act defines an *investor* as:

*"An individual, company, established fund, mutual fund, financial institution or foreign government intending to invest in a state-owned enterprise under this Act but does not include the Local Government, the Government of the Republic of Zambia, and a state-owned enterprise."*¹²⁹

Foreign investors are also entitled to the incentives outlined in the Investment Act, if such an investor qualifies for the same under *Section 30* of the Privatisation Act.

It has been argued that one major anomaly of the 1991 Investment Act, which has not been addressed by the 1993 Act, is the fact that under the definitions clause the term "*business enterprise*" does not include the Stock Exchange, Stock Exchange *Brokers* and *Dealers*. Hence, these financial institutions will not benefit from the incentives under the Act. However, the counter-argument is that investors do not invest into the Stock Exchange but into companies listed on it. Therefore, whatever incentives are available to an investor under the Investment Act will be applicable to an investor trading on the Stock Exchange.

Basically, the Investment Act of 1993 has sought to provide a comprehensive legal framework for investment in Zambia. The Investment Centre has also been re-oriented towards effective investment servicing. Unlike the 1991 Act, which was seen as a desperate attempt by the government to attract any type of investment without regard to existing enterprises, the 1993 Act is a result of a much more thorough and analytical study.¹³⁰ This Act provides for *General Incentives*.¹³¹ One of the most commendable incentives in this category is the five year exemption from income tax on rural enterprises.¹³² Rural areas often lag behind when it comes to development, so that it is best to lure investors to these areas by means of incentives. The *Special Incentives*¹³³ that apply to foreign investors will encourage foreigners to invest in otherwise loss-making enterprises as they will be greatly assisted and production will be boosted.

Generally, investment incentives, which are often in the form of *tax incentives*, encourage investors to purchase even those enterprises that are not normally very attractive to investors.¹³⁴

130 Profit Magazine, July 1992

131 Section 18

132 Section 21

133 Part IV

134 European Economy, p.71

3.1.3 THE BANKING ACT, CAP 700

The move to a market economy and, hence, the growth of the private sector generally require a financial system which collects and channels savings to their most productive uses and manages an effective system of payment.¹³⁵

In Zambia, need has been found to amend the *Banking Act* in order to promote the privatisation programme. At present, in defining "*banking business*", the Act recognises only two institutions, namely *commercial banks* and *financial institutions*. This provides a very narrow definition of banking business. It has been proposed that "banking business" should include the following as banks: *Investment* or *Merchant banks*, *Development Banks* and *Import and Export Banks*. Similarly, *Insurance* companies, *Pension Funds*, *Mutual Funds* and similar institutions should be included in the definition of financial institutions.¹³⁶

135 The Observer, December 1993/January 1994, p.12

136 Ministry of Finance: *Privatisation - Legal Perspectives*, (Unpublished), 1991, p.6

These amendments would result in a wider participation of organisations which supply the much needed capital in order to support an efficient and buoyant market.¹³⁷ The Banking Act needs immediate review in order to provide for the institutions which would be critical to the liberalised economy, especially the Stock Exchange.¹³⁸ Furthermore, the Act simply states that Merchant banking shall be carried out only by a Bank;¹³⁹ and in the Zambian context this refers to a commercial bank. It has been recommended that such banks be referred to as Investment Banks. The Banking Act in its present form is not capable of promoting a financial system in a liberalised economy, and it therefore need reviewing.¹⁴⁰

3.1.4 THE EMPLOYMENT ACT

A frequently asked question is: "*What happens to the employees of a state-owned enterprise after it has been privatised?*".

137 Ibid

138 *Establishment Of A Stock Market In Zambia* - Submission To The Ministry Of Finance, 1991

139 Section 2

140 *Establishment Of A Stock Market In Zambia* - Submission To The Ministry Of Finance, 1991

By Law, an employee has the freedom to exercise his rights to offer his services to or to withdraw his services from an employer at any time. At *common-law*,¹⁴¹ the relationship of employer and employee is a contract in which parties enter on terms laid down by themselves and within the limitations laid down by the *Law of Contract*.¹⁴²

The contract of service or employment is one of a personal nature, and it cannot be assigned by one party without the consent of the other.¹⁴³ In the case of *Nokes vs Doncaster Amalgamated Collieries Ltd*¹⁴⁴, the appellant was a miner employed by a company on which an *order* was made, under the *Companies Act*, transferring it, its liabilities and assets to the respondent company. The appellant, unaware of the order, worked for sometime, then absented himself and was charged and found guilty by the *lower Court* of an offence under the *Employers' and Workmens' Act*, namely breach of contract of employment. However, the *House of Lords* held that, apart from overriding questions of public welfare, it could not be presumed that power could be given to a Court or to anyone else to transfer a man without his knowledge and possibly against his will from the service of one person to the service of another.

141 J. Chitty, *Chitty On Contracts*, (London: Sweet and Maxwell, 1961) Vol I, 22 ed., p.652

142 Ibid

143 Ibid. See also *Section 35 of the Employment Act*

144 (1940)A.C.1014

In the privatisation process, when a company is sold to another company, there is a change of employers. The contracts of service for the employees of the S.O.E. that has been sold are re-negotiated with the buyers, who are the new employers.¹⁴⁵ Employees cannot be forced on the new employers and vice-versa. On the other hand, when there is merely a change in the shareholding of a company,¹⁴⁶ this does not constitute a change in employers.¹⁴⁷ To the ordinary employee, not versed in the intricacies of the Law, this distinction is not very easy to understand.

At a *Tripartite Consultative Labour Council Meeting*¹⁴⁸ between the Z.P.A., the *Zambia federation of Employers (Z.F.E.)*, the *Trade Unions* and the government, the ZPA proposed that, in view of the need to maintain social, political and economic stability, and to ensure that national interests are upheld in the privatisation process, and for the purpose of assuring a smooth transition from the public to the private sector, employees of S.O.E.s which are being privatised should be exempt from the provisions of *Section 35(1)* of the Employment Act which states:

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- 145** Interview With Mr. M. Musonda, Labour Law Lecturer, UNZA School of Law
- 146** As happens when *Section 22(c)* is utilised as a mode of privatisation
- 147** Op cit
- 148** Paper Presented By The ZPA To The Tripartite Consultative Labour Council Meeting, 4th February, 1994

"No rights arising under any written contract of service shall be transferred from one employer to another unless the employee bound by such contract consents to the transfer and the particulars thereof are endorsed upon the contract by a proper officer."

However, this proposed amendment was rejected on the grounds that an employment contract should not be forced upon parties. The ZPA further argued that the proposed amendment should not merely be viewed as an abrogation of the workers' rights because what they were seeking was to protect contracts of employment from terminating automatically upon privatisation of an S.O.E.¹⁴⁹ The ZPA wanted legislation passed to protect contracts of employment as happened in the U.K. where *Parliament* has passed an act called the *Transfer of Undertakings Protection of Employment Regulations Act, 1981*.¹⁵⁰ The Z.P.A. also feels that ZIMCO will be unable to pay redundancy packages. However, it is submitted that if the main problem is funding, the Privatisation Act¹⁵¹ provides that:

"With the prior approval of the Minister responsible for Finance, the proceeds of sale referred to in sub-section (1) may be used for-

149 Ibid

150 Ibid

151 *Section 39(2)(h)*

- (h) *supporting redundancy payment schemes in consultation with the Minister responsible for labour;"*

3.1.5 THE TAXATION ACT

The first major step in the field of reform was made in 1991 *Budget* when protectionist tariffs were removed. A *Tax Policy Task Force* was set up in 1992 to overhaul the tax system as it applies to *Company Tax, Customs, Tariffs* and other matters. The purpose of the tax reforms was to create an economic environment based on private initiative and market forces. Tax inequities and politically motivated tax preferences were to be avoided. the ultimate goal of tax reforms was to create a modern tax system conducive to sustained economic growth and development.

These tax reforms have, however, yet to be followed through.

3.1.6 THE COMPANIES ACT, NO.26 OF 1994

A *Companies Act*, if left unreformed, can prove to be a hinderance to a privatisation programme¹⁵² because it regulates the transfer of shares under privatisation.¹⁵³ Modern standards with regard to protection of investments, share capital, the Stock Exchange, and other cardinal issues, should be addressed by a modern Companies Act. The major purpose of reforming a Companies Act is to redress principal shortcomings such as lack of cohesion, clarity and various inconsistencies as well as insufficient detail.

152 **European Economy, p.71**

153 **Section 36(2) of The Privatisation Act**

The Companies Act, Cap 686 of The Laws of Zambia, was repealed by the Companies Act, No. 26 of 1994, because it was too difficult to incorporate a new company in Zambia, and once a company had been started the *Directors* of the company were not sufficiently accountable for their actions to the shareholders or to the general public.¹⁵⁴ Hence, the biggest changes in the Act are in these areas.

The new Act has made greater strides in ensuring that investments of shareholders are protected. Unlike the previous Act, the 1994 Act clearly defines the role of directors, and it also has a provision restraining fraudulent people from managing companies.¹⁵⁵

In a bid to encourage trading on the Stock Exchange, the Act provides that any company's shares that are listed on any Stock Exchange in Zambia shall be exempt from the provisions of the *Property Tax Act* of 1984. The Act also makes provisions for the public issue of shares and matters incidental.¹⁵⁶ The manner in which the prospectus and invitations to the public for subscription of shares shall be prepared is also provided for.¹⁵⁷

Another significant change that has been made is on the aspect of penalties and liabilities.¹⁵⁸ Penalties are much stiffer, and it is hoped they will act as effective deterrents.

154 Seminar On The Companies Act, Paper Presented By J. Graham, Drafting Department, Ministry Of Legal Affairs, October 1994

155 *Part X*

156 *Section 85*

157 *Part VI*

158 *Part XIV*

3.1.7 THE TRADING LICENSING (AMENDMENT) BILL 1993

The *Bill* was presented to Parliament on 23rd July, 1993¹⁵⁹ and aimed at simplifying and liberalising the various aspects of the law relating to trade. Of significance is the relaxation of restrictions imposed on non-Zambians. The Bill states that non-Zambians should be allowed to apply to the licensing authority for any license permitted under the Act, without the necessity of going through the Minister.¹⁶⁰ In addition, a non-Zambian should be able to apply for a license under the proposed Act in any part of the country provided the applicant has obtained an *Investment Certificate* under the Investment Act and, where the applicant is an individual, he has satisfied the requirements of the *Immigration and Deportation Act*.¹⁶¹

These provisions will enable non-Zambians to work in the rural areas and hence contribute to the development of areas that are often neglected. Together with the incentives provided under the Investment Act¹⁶² with reference to rural areas, non-Zambians will be attracted to invest in these areas.

159 Parliamentary Debates, July, 1993

160 Clause 17

161 Ibid

162 Section 21 of the Investment Act of 1993

3.1.8 THE BANK OF ZAMBIA (AMENDMENT) BILL, 1993

The Bill was presented to Parliament in 1993.¹⁶³ The *Bank of Zambia Act* needs to be amended so that it reflects the Bank's major function as *licenser, supervisor and regulator* of commercial banks and financial institutions.¹⁶⁴ The Bank of Zambia is the *Central Bank* and it thus plays a pivotal role in the new economic environment.

In order for the Bank to play this major role, the Bank of Zambia Act should be given a major overhaul.¹⁶⁵

3.1.9 ENABLING ACTS OF FINANCIAL INSTITUTIONS

- (a) The *Local Authorities Superannuation Fund*, CAP 476;
- (b) The *Workmen's Compensation Fund*, CAP 509;
- (c) The *Zambia National Provident Fund*, CAP 516;
- (d) The *Civil Service (Local Conditions) Pension Fund*, CAP 140.

These financial institutions have adequate financial capacities to utilise their members' contributions in income generating investments on the Stock Exchange. The Privatisation Act¹⁶⁶ provides for established funds to participate in the purchase of shares in privatised enterprises with the consent of the members.

163 Parliamentary Debates, July 1993

164 Ibid

165 Ministry of Finance: *Privatisation - Legal Perspectives*, (Unpublished), 1991

166 Section 28

However, legally, the enabling Acts of these institutions have not been amended in order to permit them to actively participate in the privatisation programme.¹⁶⁷

3.2 THE STOCK EXCHANGE

A *Stock Exchange* is defined as a market in which *securities* are bought and sold.¹⁶⁸ In a liberalised economy such as Zambia's, a Stock Exchange is necessary as it facilitates the channelling of savings and investments.¹⁶⁹ The existence of a domestic market broadens the range of options available to a government in the implementation of a privatisation programme. Listing a company on a Stock Exchange makes it possible to effect a partial or total transfer of the equity being divested to a target group drawn upon from a wide range of potential investors.¹⁷⁰ The principle of protecting the investor is the key to a successful financial and investment market in a Stock Exchange environment. Companies stand to lose heavily in seemingly legitimate takeover and merger ventures. This is where directors and Stock Exchange brokers engaged in insider-dealing¹⁷¹ reap millions where they did not invest anything.

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- 167 Ministry of Finance: Privatisation - Legal Perspectives, (Unpublished), 1991
- 168 R.R. Pennington, Company Law (London: ,1967), p.212
- 169 Ibid
- 170 H. Sasson, Privatisation: The Conceptual Framework And Practicalities Of Privatisation Programme Implementation, (1991), p.1
- 171 For a discussion on *Insider-Dealing* see Improper Trading Practices under the same chapter.

3.2.1 SHORT-COMINGS OF THE STOCK EXCHANGE ACT, NO. 43 OF 1990

The Stock Exchange Act of 1990 had quite a number of anomalies, especially since it was a mere replica of the Stock Exchange Act of 1970.¹⁷² These anomalies were raised during seminar discussions on the Stock Exchange Act.¹⁷³ The *Securities Act*, ~~Cap~~^{NO} 38 of 1993 was enacted to redress these anomalies.

The 1990 Act had been enacted *inter alia* without provisions relating to a *Compensation Fund*, safeguards against improper trading practices, collective investment schemes, safeguarding of investors' property, *prospectus* requirements, unlawful securities markets, investment advisors and investment advisory contracts.¹⁷⁴ In order for Zambia to effectively open up her economy and attract foreign exchange, such pertinent issues must be addressed. The dangers that investors face on the Stock Exchange are many, such as *frauds*, and it is therefore important that investors feel adequately protected by legislation.¹⁷⁵ The Securities Act established a *Securities and Exchange Commission* (S.E.C.), which succeeded the *Zambia Securities and Exchange Commission*,¹⁷⁶ and performs the role of providing protection to investors' interests.

The Securities Act has basically addressed the following issues:

172 Ibid

173 Ibid

174 Ibid

175 Ibid

176 Section 4

3.2.1.1 COMPENSATION FUND

A major loophole in the Stock Exchange Act was the omission of the establishment of a *Compensation Fund*, which is now catered for in the Securities Act.¹⁷⁷ The Act then proceeds to outline the purpose of the Fund, which is to compensate persons who suffer pecuniary loss occasioned by any default of a licensed dealer or licensed investment adviser or any employee of such a dealer. This loss must be in relation to any money, securities or other property which is received in the course of or in connection with the business of such licensee.¹⁷⁸

Provision is also made for a committee to administer the Fund¹⁷⁹ and which can recover any funds so disbursed by initiating legal action in any court of competent jurisdiction.¹⁸⁰ The aim of this provision is to safeguard against any improper motives that licensed dealers may have and it also seeks to ensure that professional conduct of a high standard is maintained.¹⁸¹

3.2.1.2 IMPROPER TRADING PRACTICES

There is need to regulate dealings in a company's shares to prevent a situation in which confidential information is misused by officers of the company or their close associates.

177 Section 4

178 Section 67

179 Section 68

180 Section 77

181 UNDP - Ministry of Finance Seminar, 26th September, 1991

This practice is referred to as *Insider-Dealing* and, if not checked, it can affect the value of a company's shares on the market.¹⁸² Insider-trading is a cardinal issue which must be addressed by effective legislation so as to preserve the integrity of a stock market, for the success of a stock market is dependent on its reputation and the confidence that the general public has in it.¹⁸³ The Act has adequately dealt with this aspect. It provides that:

*"a person who deals or procures another to deal in securities of a company concerning which he has any knowledge that is not publicly available and would, if it were publicly available, materially affect the price of securities, shall be liable on conviction to a fine not exceeding ten million kwacha or to imprisonment for a term not exceeding five years."*¹⁸⁴

The penalty provided for under the Act is an indication of the gravity of the offence.

This section covers any *director*, officer, or employee of the company which commits this offence, together with any persons associated in a professional capacity with that company, and any person who obtains such information from any of the persons mentioned above.¹⁸⁵

182 G. Morse, *Charlesworth's Company Law*, (London: Stevens and Sons, 1987), p.475

183 *Ibid*

184 *Section 52*

185 *Section 48(1)*

In the case of *Attorney-General's Reference*¹⁸⁶ (No.1 of 1988), the rationale behind the prohibition of "insider-dealing" was laid down as being:

"the obvious and understandable concern ... about the damage to public confidence, which insider-dealing is likely to cause and the clear intention to prevent so far as possible what amounts to cheating when those with inside knowledge use that knowledge to make a profit in their dealings with others"

3.2.1.3 COLLECTIVE INVESTMENT SCHEMES

The Securities Act establishes *Collective Investment Schemes*¹⁸⁷ which are defined as any arrangement with respect to money, or other arrangement under which persons can participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property, or sums paid out of such profits or income. Property can also be owned or held in trust by or managed on behalf of a body corporate. The interests of persons participating in these arrangements can be represented by shared trusts or units.¹⁸⁸

186 (1989) A.C. p.471

187 Part X

188 Section 72

The rationale behind this type of investment is to spread the investment risk. The scheme endeavours to minimise the losses suffered on the Stock Exchange.¹⁸⁹ This is particularly good for "small-time" investors as they can come together under such a scheme and represent a very large *cartel* which will distribute the risk among the members.

3.2.1.4 INVESTMENT ADVISORY CONTRACTS

The Act defines an *investment adviser* as:

*"a person who carries on a business of providing advice to persons with respect to investments ..."*¹⁹⁰

The Securities Act has omitted certain *advisory contracts* which are deemed to be illegal, such as those in which the payment of remuneration is to be made by the client to the investment adviser on the basis of a share of capital gains of the funds or any part of the funds of the client.¹⁹¹

189 UNDP - Ministry of Finance Seminar, 26th September, 1991

190 Section 2

191 Section 4(1)

Investors are in a very vulnerable position when they enter into advisory contracts. It could be said that these contracts require utmost good faith, that is contracts of *uberimea fidei*, and the investment adviser is in a *fiduciary relationship* with the investor. He must therefore perform his duties for the benefit of the investor. It is important that the Act has provided a stiff penalty for breach of the provisions of this section by the investor. Upon conviction, an investment advisor is liable to a fine not exceeding *one million kwacha*,¹⁹² and the contract is voidable at the option of the investor.¹⁹³

3.2.1.5 PROSPECTUS REQUIREMENTS

A *prospectus* is a vital document in stock trading, and the general public is offered shares in terms of the prospectus.¹⁹⁴ Its primary function is to provide investors with all the relevant information they would need in order to make an investment decision.¹⁹⁵

192 Section 41(4)

193 Ibid

194 Euromoney, Privatisation Seminar: *Floats And Sales To The Public*, 1993

195 Ibid

The prospectus covers the terms of the public offer, the history and nature of the business, background information on management, employees, plant premises, working capital, a statement of the current profits, prospects and dividends of the company.¹⁹⁶

Therefore, the aim of a prospectus is to safeguard the interests of the investors so that they know beforehand what kind of company they are trading in. The Securities Act makes provision for a prospectus,¹⁹⁷ but the Act does not endeavour to define the term.

3.3 PRELIMINARY CONCLUSIONS

The Acts discussed in this chapter are not the only specific Acts needing reforms. Most, if not all, Acts which regulate the operation of business in the country need thorough revisions to bring them in line with the privatisation programme.

196 **Ibid**

197 **Section 33**

For instance, the various *bye-laws* under the *Local Government Act*, which regulate the issuance of numerous licenses for a business enterprise to operate, will need to be studied and either amended, updated or repealed in order that they can effectively guide a liberalised economy.

Finally, it is commendable that a Stock Exchange has been established as it is a vital support system for a privatisation programme.

Chapter 4

4.0 CONCLUSIONS

Worldwide experiences of privatisation indicate that new ground has been broken, fundamental principles been debated and established, mistakes made and minimised, and new variations or refinements proposed.¹ It can therefore be said that a stage has now been reached where it is possible to take stock of what has been learned so far. Global experiences indicate that privatisation is possible, although it is not a very easy process.

First and foremost, it is important that the "*national interest*" should be defined and a list of priorities and a timetable should be formulated. Such a timetable must be flexible because there are many unpredictable factors which can affect timing and selection of the activities to be privatised.² The major objective of privatisation is that the chosen enterprise should be exposed to the vagaries of markets, and this in itself demands flexibility.³

1 Euromoney Seminar: *Privatisation In Southern Africa, Gearing Up A Privatisation Programme*, p.1

2 Ibid

3 Interview With Mrs. F. Mumba, Senior Technical Adviser, Z.P.A., 2nd August, 1994

Lastly, a privatisation timetable should proceed from relatively simple and easy cases to the more complex and potentially difficult cases. Hence, a record of successes can be established, which assists successive privatisations.⁴

In the Zambian context, it is submitted that the government has clearly defined the national interest.⁵ A privatisation timetable (or a *Divestiture Sequence Plan*) has also been formulated, and this timetable is meant to be a flexible plan such that companies may be moved to tranches where investor interest is shown.⁶ The programme also began from simple to much more complex industries.

With the enactment of the Privatisation Act on 3rd July, 1992, clear guidelines were thereby provided for the implementation of the privatisation programme in Zambia. As a result so far, the programme has been proceeding smoothly inspite of the problems that the ZPA is encountering, such as lack of adequate financing and legal constraints.

4 Ibid

5 *New Economic Recovery Programme, 1992-1994*, paras. 36-40

6 Ministry Of Commerce, Trade And Industry, *Long-Term Divestiture Programme*, 11th July, 1992 (Unpublished)

The Privatisation Act has more or less addressed the major issues that an overall Privatisation Act should address. It has, for instance, addressed the major objective of privatisation which is to enable competition and hence avoid the creation of monopolies. The Act also enables the government to retain a special or "*Golden Share*" in a privatised industry, but that government must seek the advice of National Assembly when it seeks to retain such a share in a privatised S.O.E..⁷

Critics claim that a "special" share allows a government, within narrow limits, to dictate the structure of major privatised enterprises. But in the final analysis, for political reasons, it is necessary for a government to have a certain amount of control of the major industries in a nation. This is a reality that cannot be ignored. However, the Act is silent on the aspect of whether or not the government is *accountable* to the National Assembly when activating a golden share. It is submitted that this, in itself, leaves this provision open to abuse.

The major fear of the public, with regard to the Privatisation Programme, is that wide share ownership, which is a major objective of the Privatisation Act, stands to be defeated.

This is because it is felt that since most of the attractive parastatals lined up for privatisation have foreign minority shareholders with *pre-emptive rights*, such parastatals will eventually end up being owned by multinational companies. However, the question of pre-emptive rights should not be viewed as an obstacle to the success of the privatisation programme. In most cases, the minority shareholders do waive their pre-emptive rights in order to assist in the success of the programme. It should also be noted that if shareholders are in conflict as to whether or not an enterprise should, for instance, be broken into smaller units in readiness for privatisation, the majority shareholders, who happen to be the government, can exercise their voting rights and the minority shareholders stand to be defeated.

The general public also raised the view that public officers and political leaders could easily manipulate the programme especially since the Act had not defined the two terms. To counter-act these fears, the Privatisation (Political Leaders and Public Officers)(Bidding) Regulations, Statutory Instrument No. 64 of 1994 was passed. Basically, the regulations have covered those persons holding top government positions and also political leaders, such as the leader of the official opposition.

The aspect of massive *redundancies* following privatisation is another worrying issue. The Privatisation Act⁸ provides for the payment of redundancy packages in the event of workers being laid off as a result of privatisation. However, in most cases, the ZPA negotiates with buyers of privatised S.O.E.s so that massive lay-offs are avoided.

The establishment of a Stock Exchange in Zambia is welcome in that it will broaden the range of options available to the government in carrying out the privatisation programme and it will also attract potential investors drawn from a wide group. However, it is submitted that the concept of investing in shares is not something that most Zambians readily appreciate, and most Zambians do not have enough capital to participate in the Stock Market. It will therefore take a while before the Stock Exchange becomes a working reality. It also submitted that legislation has not adequately addressed the issue of protecting investors.

This paper has endeavoured to present an over-view of the privatisation process in Zambia *vis-a-viz* legislation. Legal issues permeate the whole privatisation process, from preparation to implementation.⁹ The necessity of reviewing business legislation has been emphasised. Like most African countries, Zambia has an inadequate legal base.

8 *Section 39*

9 *Privatisation: The Lessons Of Experience, World Bank Report, p.20*

Therefore, privatisation needs to be accompanied by revision of the legal system. Business legislation, which will of necessity affect the programme, should be over-hauled to ensure that such legislation will promote the programme. A start has already been made with the enactment of the new Companies Act, No, 26 of 1994.

Finally, it is also felt that the issue of publicity is important in the privatisation programme. Information flow has so far been inadequate, a situation which may result in the public losing confidence in the whole programme and not fully participating in it. However, this situation is being redressed in that the ZPA has began running advertisements in the national media to educate the general public.

4.1 RECOMMENDATIONS

1. In order for the privatisation programme to achieve its objectives of competition, a *Competition Law* should be enacted as soon as possible. This is a vital piece of legislation in that it regulates anti-monopoly practices and restrictive business practices.

2. It is recommended that to prevent government acting arbitrarily when it activates a *Golden Share* in a privatised S.O.E., legal safeguards should be put in place. For instance, the government could be held accountable to a *Select Committee of National Assembly*.
3. The *Privatisation (Political Leaders and Public Officers) (Bidding) Regulations*, Statutory Instrument No. 64 of 1994, has not included Deputy Permanent Secretaries in its definition of "*public officer*". It is submitted that since in the absence of a Permanent Secretary his Deputy carries out his duties, the latter can gain access to confidential material. In fact, by the sheer fact that he is the right-hand man to the Permanent Secretary, the Deputy Permanent Secretary of a Ministry is a public officer in the same manner that the Deputy Secretary to the Cabinet falls under the definition of public officer. It is therefore recommended that the Regulations should under the term "*public officer*" include Deputy Permanent Secretaries, and hence place such persons under a duty to disclose their intentions to bid in a S.O.E., in the manner laid down in the Regulations.
4. It submitted that the enabling Acts of *Established Funds*, such as the *Z.N.P.F.*, should be ammended to allow them to participate in the privatisation programme.

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5. It is recommended that comprehensive *Investor Protection Laws* should be enacted.
 6. It is submitted that the government should speed up the process of reviewing legislation so as not to hamper the privatisation programme.
 7. It is submitted that the Privatisation Act should itself be the subject of scrutiny at periodic intervals in order to ensure that it keeps pace with the challenges of privatisation.
 8. It is recommended that, in order for the *Select Committee On The Composition Of The ZPA* to be able to "scrutinise" members nominated to form part of the Agency, each organisation must put forward more than one candidate.
 9. Finally, it is recommended that legal safe-guards should be enacted to ensure that all parties comply with the terms of privatisation agreements.

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DIVESTITURE SEQUENCE PLAN

Tranche 1

1. AFE Limited
2. Crushed Stone Sales Limited
3. Consolidated Tyre Services Limited
4. Eagle Travel Limited
5. Mwinilunga Cannery Limited
6. Nkwazi Manufacturing Company Limited
7. Poultry Processing Company Limited
8. Zambia clay Industries Limited
9. Auto Care Limited
10. Cleanwell Dry Cleaners
11. Coolwell Systems Limited
12. General Pharmaceuticals Limited
13. Monarch Zambia Limited
14. National Drum and Can Company Limited
15. Norgroup Plastics Limited
16. Prime Marble Products Limited
17. Zambia Maltings Limited
18. Zambia Ceramics Limited
19. Zuva Zambia Limited

DIVESTITURE SEQUENCE PLANTranche 1

1. AFE Limited
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3. Consolidated Tyre Services Limited
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10. Cleanwell Dry Cleaners
11. Coolwell Systems Limited
12. General Pharmaceuticals Limited
13. Monarch Zambia Limited
14. National Drum and Can Company Limited
15. Norgroup Plastics Limited
16. Prime Marble Products Limited
17. Zambia Maltings Limited
18. Zambia Ceramics Limited
19. Zuva Zambia Limited

DIVESTITURE SEQUENCE PLANTranche 2*Agriculture/Agro-Industry*

20. Antelope Wholesale Merchants Limited
21. Jamas Milling Company Limited
22. Olympic Milling Company Limited
23. Chimanga Changa Milling Company Limited
24. Kabwe Milling Company Limited
25. Chico Milling Company Limited
26. Amalgamated Milling Company Limited (EC Milling Co., Ghiradi Milling Co., Robinhood Milling Co.)
27. Mpongwe Development Company Limited
28. National Milling Company Limited
29. Zambia Sugar Company Limited
30. Nanga Farms Limited
31. Zambia Breweries Limited
32. National Breweries Limited
33. Zambia Cashew Company Limited

Construction

34. Chilanga Cement Limited
35. Zambia Engineering and Contracting Company Limited

DIVESTITURE SEQUENCE PLAN

Chemicals

36. Kafironda Limited

Packaging

37. Kapiri Glass Products Limited

Tourism

38. Zambia Hotel Properties Limited

Engineering

39. Lusaka Engineering Company Limited
40. Metal Fabricators of Zambia Limited

Agriculture/Agro-Industry

41. Zambia Horticultural Products Limited
42. Lint Company of Zambia Limited
43. National Tobacco Company Limited
44. Dairy Produce Board
45. Zambia Cold Storage Corporation Limited
46. Lukanga Investments and Development Company Limited
47. Indeco Milling Limited
48. United Milling Limited

DIVESTITURE SEQUENCE PLAN

Tranche 4

Agriculture/Agro-Industry

- 56. Nchanga Farms
- 57. NIEC Farms Limited
- 58. Zambesi Sawmills (1968) Limited

Construction

- 59. MIL Construction

Energy

- 60. Lublend Limited

Engineering

- 61. ZAL Elevators

Finance

- 62. Zambia National Commercial Bank Limited

Trading

- 63. National Home Stores Limited

DIVESTITURE SEQUENCE PLAN

Tourism

- 64. Africa Bound Limited
- 65. Lake Hotels Limited

Transport

- 66. Mulungushi Traveller

DIVESTITURE SEQUENCE PLAN

Tranche 5

Agriculture/Agro-Industry

- 67. Kawambwa Tea Company Limited
- 68. MEMACO Farms

Chemicals

- 69. National Drug Company Limited

Construction

- 70. Buildwell Construction Limited
- 71. Mpelembe Properties Limited
- 72. Zambia Steel and Building Supplies Limited

Engineering

- 73. MIL Engineering and Tooling Limited

Packaging

- 74. Kabwe Industrial Fabrics Limited

DIVESTITURE SEQUENCE PLAN

Tourism

- 75. Mundawanga Zoo and Botanical Gardens
- 76. National Hotels Development Corporation Limited

Trading

- 77. Mwaiseni Stores Limited
- 78. Redirection Placement Limited

Transport

- 79. Lusaka Urban Rail Transport

Tranche 6

Agriculture/Agro-Industry

- 80. Zambia Coffee Company Limited
- 81. Zambia Seed Company Limited

DIVESTITURE SEQUENCE PLAN

Finance

82. Africa Intercontinental Insurance Services Limited
83. Development Bank of Zambia Limited
84. Export and Import Bank of Zambia Limited
85. State Insurance Medical Trust Limited
86. Zambia National Building Society
87. Zambia State Insurance Corporation Limited
88. Zambia State Financing Company Limited
89. Zambia State Property Development Company Limited
90. Zambia State Security Limited

Transport

91. Contract Haulage Limited
92. United Bus Company of Zambia Limited
93. Mpulungu Harbour Corporation Limited

Mining

94. Mindeco Small Mines Limited

DIVESTITURE SEQUENCE PLAN

Tranche 7

Chemicals

95. Zambia Oxygen Limited

Mining

96. Kagem Mining
97. Kariba Minerals Limited
98. Kariba Amethyst Marketing Limited
99. Reserved Minerals Corporation Limited Group
100. Zambia Emerald Industries Limited

Trading

101. City Radio and Refrigeration Supplies (1975) Limited

Transport

102. Intercontinental Travel Limited
103. Luangwa Industries Limited

DIVESTITURE SEQUENCE PLAN

Tranche 8

Agriculture/Agro-Industry

- 104. MIL Sawmilling and Joinery Limited
- 105. Zambia Forestry and Forest Industries Limited

Finance

- 106. Indo-Zambia Bank Limited

Manufacturing

- 107. Mansa Batteries Limited

Trading

- 108. NIEC Agencies Limited

Transport

- 109. Dunlop Zambia Limited
- 110. Mines Air Services Limited
- 111. Rycus Heavy Haulage Limited

DIVESTITURE SEQUENCE PLAN

Tranche 9

Agriculture/Agro-Industry

- 112. Nitrogen Chemicals of Zambia Limited
- 113. Duncan Gilbey and Matheson

Finance

- 114. Zambia National Insurance Brokers Limited

Mining

- 115. Maamba Collieries Limited

Real Estate

- 116. Anros Industries Limited

Tourism

- 117. Circuit Safaris Limited

Transport

- 118. Livingstone Motor Assemblers Limited
- 119. National Airports Corporation

DIVESTITURE SEQUENCE PLAN

120. Zamcargo Zambia Limited

Tranche 10

Construction

121. ZIMCO Properties Limited

Energy

122. BP Zambia Limited

123. Zamlube Refineries Limited

Real Estate

124. INDECO Estate Development Company Limited

Trading

125. NIEC Overseas Services Zambia Limited

Transport

126. Engineering Services Corporation Limited

DIVESTITURE SEQUENCE PLANTranche 11*Communications*

127. Zambia National Broadcasting Corporation Limited

Energy

128. AGIP (Zambia) Limited

Finance

129. Zambia Housing Development Fund Limited

Mining

130. MEMACO Group
131. MEMACO Trading Limited, London
132. MEMACO Trading Limited, USA
133. MEMACO Services Limited

Transport

134. Zambia Airways Corporation Limited
135. National Air Charters (Zambia) Limited
136. Zambia National Shipping Company Limited
137. Zambia Concrete Limited

DIVESTITURE SEQUENCE PLAN

State-Owned Enterprises Scheduled For Privatisation

(The timing to privatise these companies is still to be determined)

- 138. Zambia Consolidated Copper Mines Limited
- 139. Indeni Petroleum Refinery Company
- 140. Tazama Pipelines
- 141. ZIMOIL Division
- 142. Post and Telecommunications Corporation
- 143. Zambia Electricity Supply Corporation
- 144. Zambia Railways